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LEGAL ETHICS

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The Internet Even Affects Your Ethics

Ethical duties and risk management must be considered when you incorporate technology in your practice

By STEVEN A. LEWIS

Love it or hate it, the information technology revolution has become an integral part of the 21st century law office. As a result, we must all consider what happens when the information superhighway intersects with our duties of competent representation, undivided loyalty and confidentiality. In this article, we will explore the impact of the internet — defined by the Illinois Bar Association in opinion no. 96-10 as a supernetwork of computers that links together individual computer networks located at academic, commercial, government and military sites worldwide — on those duties.

The internet, competence and the duty of care

The standard of care governing lawyers has been defined as the duty: (1) to have and to use that degree of care, learning and skill ordinarily possessed by reputable attorneys practicing in a comparable locality under similar circumstances; and (2) to use reasonable diligence and best judgment in the exercise of skill and in the application of learning. (BAJI 6.37.)

In further defining the scope of an attorney's standard of care, the California Supreme Court has weighed in with several critical observations. First, the quality of a lawyer's services must be examined by the "indicia of the law which were readily available" to the attorney at the time the legal services were performed. Second, attorneys are expected to discover rules of law, that although not commonly known, may be found by standard research. Third, attorneys have an obligation to undertake reasonable research in an effort to ascertain relevant legal principles and to make informed decisions, even with respect to unsettled areas of the law. (Smith v. Lewis (1975) 13 Cal.3d 349.)

In attempting to apply these criteria in the context of the internet's impact on the practice of law, we need to keep in mind that the determination of whether an attorney has undertaken reasonable research is generally made by a jury based upon the testimony of attorneys acting as expert witnesses. (BAJI 6.37.4.)

At two CLE seminars on the role of technology in the legal profession, nearly 90 percent of the attorneys indicated that they use the internet to conduct legal research. With those numbers in mind, imagine a situation where there is no case law within California on a given issue, but there is compelling law from other jurisdictions that favors the client's position. Would a malpractice lawyer have a difficult time finding an expert to testify that it was below the standard of care to fail to find out-of-state authorities readily available on the internet and present them to the court? Most probably not.

Legal research is not the only arena for internet use by lawyers. The Seventh Circuit has examined the role of the internet in the context of evaluating whether a plaintiff had been on sufficient notice of facts to start the statute of limitations running on a fraud claim. (*Whirlpool Fin. Corp. v. GN Holdings, Inc.* (7th Cir. 1995) 67 F.3d 605.) Noting the wide availability of governmental and business information in the public domain, the court concluded that the plaintiff was presumed to have information readily available on the internet.

The plaintiff was therefore imputed with constructive knowledge of that information dating back to its earliest concerns about the fraud claim, resulting in a finding that its claim was time barred. Needless to say, if a client can be held to constructive knowledge of information available on the internet, it is not difficult to imagine an expert witness holding counsel to similar or even higher standards of care.

Many lawyers overlook the fact that a failure to provide competent representation can lead to discipline by the State Bar as well as malpractice claims. Rule 3-110(A) of the California Rules of Professional Conduct states that a lawyer shall not "intentionally, recklessly, or repeatedly fail to perform legal services with competence." Rule 3-310(B) then defines competence as applying the (1) diligence, (2) learning and skill, and (3) mental, physical and emotional ability reasonably necessary for the performance of legal services provided. Thus, it is important for all lawyers to consider the nexus between the internet and attorney competence to protect themselves not only from legal malpractice claims, but from potential State Bar discipline as well.

While failing to use the internet for legal research and factual investigation can create risks for lawyers, use of the internet can create its own separate set of risks. One significant area of concern arising from lawyers' use of the internet involves the potential for inadvertently establishing attorney-client relationships with "cyber clients."

Under California law, the fiduciary relationship between an attorney and a client "extends to preliminary consultations by a prospective client with a view to retention of the lawyer, although actual employment does not result." (*People ex rel Department of Corporations v. Speedee Oil Change Systems, Inc.*, (1999) 20 Cal. 4th 1135.) Moreover, an attorney is deemed to represent a client (at least for conflict of interest purposes) when she "knowingly obtains material confidential information from the client and renders legal advice or services as a result." *Id.* at p. 1148.

Most lawyers have heard of colleagues being sued for giving legal advice at cocktail parties. One case that comes to mind is the attorney who casually advised a "cocktail party client" that she had one year to bring her personal injury action from an accident. Based on this conversation, the "client" waited ten months to hire a personal injury lawyer. Thereafter, upon learning her claim against the public entity responsible for maintaining the dangerous intersection where the accident occurred was time barred, she sued the cocktail party lawyer for malpractice.

In the era of the internet, the risks presented have moved from the real chat rooms of the cocktail party to the virtual chat rooms of the internet. Thus, lawyers must exercise great caution in: (1) conversing with prospective clients in chat rooms; (2) making postings to newsgroups answering questions seeking legal advice; and (3) inviting and responding to inquiries made over law firm web sites.

Because of the serious ramifications that can flow from the inadvertent establishment of attorney-client relationships, lawyers are best served by never giving casual legal advice to anyone — at a cocktail party, over the internet, in the gym or anywhere else. In addition, lawyers should never be rushed into giving advice to cyber clients they do not know, about matters where they do not have the necessary facts, and without running a proper conflict of interest check. Instead, lawyers should treat prospective clients met over the internet in the same manner as prospective clients who call on the telephone or walk in the door: (1) begin by running a thorough conflict of interest review before taking any confidential information; (2) evaluate and screen both the client and the matter before taking on the mantle of duties owed to clients; and (3) enter into a written fee agreement outlining the scope and nature of your representation, or send a non-engagement letter. And remember, while the pace of life on the information highway is high-speed, do not let prospective clients, from the internet or elsewhere, push you into providing instantaneous legal advice before you have followed an appropriate protocol.

The internet and the duty of undivided loyalty

The duty of loyalty stands at the core of a client's sense of trust and security in his or her lawyer. (*Flatt v. Superior* (1995) 9 Cal.4th 275.) Hence, a breach of the duty of loyalty can result in an array of unpleasant consequences including disqualification, a malpractice claim, disgorgement or forfeiture of fees, sanctions and disciplinary action.

The primary risks found at the intersection of the internet and the duty of loyalty derive from the inadvertent establishment of attorney-client relationships. Thus, in order to prevent breaches of the duty of loyalty lawyers should use the same protocols in responding to internet inquiries that are used when prospective clients approach by more traditional means.

The most common way for lawyers to receive contacts from cyber clients is through the "contact us" page of a law firm website. To avoid potential risks, lawyers should seriously consider adding a disclaimer to their web pages concerning contacts with the firm. The disclaimer should contain clear warnings that: (1) the visitor should not impart confidential information through the web site unless and until the attorney confirms in writing that there are no conflicts of interest and that the attorney requests additional information; and (2) no attorney-client relationship will be formed absent a written retainer agreement that is signed by the lawyer and the client and that defines the scope of the representation.

The internet and the duty to maintain client confidences

Standing together with the fiduciary duty of undivided loyalty is the distinct but related fiduciary obligation to maintain and preserve client confidences. (*People, etc. v. Speedee Oil Change Systems, Inc.*, supra.) The duty to maintain the confidentiality of client communications and information is codified not only in the Evidence Code provisions pertaining to the attorney-client privilege (§950, et seq.) but also in Business and Professions Code §6068(e) which states that it is the duty of an attorney "to maintain inviolate the confidence, and at every peril to himself or herself, to preserve the secrets, of his or her client."

The issue of whether confidential client communications can be transmitted over the internet has been addressed both by the California legislature and the American Bar Association. In an amendment to Evidence Code §952, the legislature expressly decreed that an attorney-client communication is not deemed lacking in confidentiality solely because it is transmitted by electronic means. Thus, an attorney who otherwise takes reasonable precautions to protect the confidentiality of electronic communications with a client will be deemed to be communicating confidentially.

In formal opinion 99-413, the Standing Committee on Ethics and Professional Responsibility of the ABA concluded that e-mail communications, including those sent unencrypted over the internet, are confidential as they pose no greater risk of interception or disclosure than other modes of communication commonly relied upon as having a reasonable expectation of privacy.

However, as noted in the ABA opinion, lawyers should consider with their clients the particular sensitivity of their communications and the relative security of e-mail versus other modes of communication depending upon the circumstances. In fact, these considerations should be discussed with clients relative to all modes of communication. For example, a lawyer should consult with a client about whether the client is in a position to maintain the confidentiality of faxes sent to the client's workplace, or the nature of messages that should be left on voicemail or with a co-worker.

In addition, if you find yourself communicating with clients via e-mail, do not assume you can maintain a "paperless" file unless you have a safe method of backing up and storing all of the information you are sending and receiving over the internet.

Conclusion

Every lawyer practicing in the 21st century should evaluate how the information superhighway intersects with their own law practices, with close attention paid to the duties of due care, undivided loyalty, and confidentiality. Lawyers who are "technologically challenged" and resist the new technology need to recognize that a failure to use the internet can adversely affect their ability to provide cost effective or even competent legal representation.

On the other hand, lawyers who have embraced the internet must take great care to avoid developing a class of disgruntled cyber clients, complaining about misunderstandings concerning the existence or scope of the attorney-client relationship. While the internet can be a source of risk, it also can be a source of tremendous benefit to lawyers and their clients. For the benefits to outweigh the risks, lawyers should incorporate the internet into their law practices, thoughtfully, ensuring that ethical duties and risk management tools are carefully considered.

In other words: Go forward into the 21st century; but do it carefully!

©Steven A. Lewis, 2001 and 2002. All rights reserved by Steven A. Lewis. Lewis, a principal of Lewis & Bacon in Sacramento, has been advising and representing lawyers for more than 25 years. He is a frequent speaker and author on legal ethics and risk management and is also an adjunct professor of law at McGeorge School of Law.

Test —Legal Ethics

1 Hour MCLE Credit

This test will earn 1 hour of MCLE credit in Legal Ethics.

1. True/False. Attorneys may be held to have a duty to discover rules of law that are not commonly known.
2. True/False. Failure to represent clients competently may be a breach of the duty of due care giving rise to malpractice exposure, but will not subject a lawyer to discipline.
3. True/False. Lawyers can safely practice law without relying on the internet for legal research.
4. True/False. Lawyers can safely practice law without using the internet for factual investigation relevant to clients' legal matters.
5. True/False. The duty of due care not only requires an attorney to have and to use the degree of learning and skill possessed by reputable attorneys in the community, but also requires the use of "best judgment" in the application of learning.
6. True/False. A lawyer does not have an attorney-client relationship with a client until the lawyer and client enter into an oral or written agreement.
7. True/False. Giving legal advice over the internet to a prospective "client" creates a risk the lawyer will breach the duty of care, not the duty of loyalty.
8. True/False. A lawyer should conduct a conflict of interest check before providing any legal advice to a prospective client who has contacted a lawyer through the lawyer's web site.
9. True/False. The duty to protect confidential attorney-client communications is codified in the Business and Professions Code, not in the Evidence Code.
10. True/False. In order to maintain confidentiality of attorney-client communications, e-mail should necessarily be encrypted.
11. True/False. Transmission of confidential information electronically is much riskier than other more traditional means of transmitting information, such as the postal service.
12. True/False. Lawyers should obtain their clients' consent before transmitting confidential information via e- mail.
13. True/False. A breach of the duty of loyalty can give rise to a forfeiture of attorney's fees.

14. True/False. The internet is a supernetwork of computers that links together individual computer networks located at various sites, including academic and governmental sites, worldwide.
15. True/False. Law firm web sites create increased risks that lawyers will be held to have established attorney-client relationships with prospective clients with whom they have no fee contracts.
16. True/False. The duty of due care owed to “cyber” clients is different than the duty of due care owed to clients the attorney has met face to face.
17. True/False. To be competent, an attorney must not only be mentally and physically able to represent a client, but also must be emotionally able to do so.
18. True/False. An attorney does not need to advise a client that the client can be held to have a duty to discover facts relevant to a legal matter that are readily available on the internet.
19. True/False. There is case law in California expressly holding that the duty of care requires attorneys to conduct computerized research.
20. True/False. Because there is no case law on point, an expert witness could not testify that the standard of care requires a lawyer to conduct internet research in a given situation.

Certification

- This activity has been approved for Minimum Continuing Legal Education credit by the State Bar of California in the amount of 1 hour, of which 1 hour will apply to Legal Ethics.
- The State Bar of California certifies that this activity conforms to the standards for approved education activities prescribed by the rules and regulations of the State Bar of California governing minimum continuing legal education.

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|--------------------------|--------------------------|
| 1. TRUE ____ FALSE ____ | 11. TRUE ____ FALSE ____ |
| 2. TRUE ____ FALSE ____ | 12. TRUE ____ FALSE ____ |
| 3. TRUE ____ FALSE ____ | 13. TRUE ____ FALSE ____ |
| 4. TRUE ____ FALSE ____ | 14. TRUE ____ FALSE ____ |
| 5. TRUE ____ FALSE ____ | 15. TRUE ____ FALSE ____ |
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| 8. TRUE ____ FALSE ____ | 18. TRUE ____ FALSE ____ |
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| 10. TRUE ____ FALSE ____ | 20. TRUE ____ FALSE ____ |